



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

cc: ORE-REC

AUG 21 1998

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Communication with Third Parties Regarding Enforcement Actions

FROM: Steven A. Herman
Assistant Administrator

TO: Regional Administrators
Regional Counsel

This memorandum is to make certain that you are aware of Agency policies concerning communications about enforcement actions with defendants, respondents, or outside parties. Regional Counsels in particular are asked to ensure that all managers and staff are advised of these requirements and proceed accordingly.

Employees should not communicate with a defendant or respondent regarding a specific enforcement action, including matters that are in negotiation prior to civil referral or civil or administrative complaint, without close coordination with the lead Agency counsel for the matter. In fact, any "pertinent communication with parties in litigation must be conducted through the attorneys assigned to the case." Memorandum from the Administrator on Serving the Public Interest (August 6, 1993).

EPA Ethics Advisory 90-2 states that, "EPA employees must be careful not to disclose non-public information that will interfere with an investigation or litigation." Ethics Advisory 90-2, on Outside Communications Regarding Matters Under Investigation, in Pre-Litigation Stages, or in Litigation (October 26, 1990). This advisory requires that contacts by individual Members of Congress or their staff on, "matters which are under investigation, in pre-litigation, or in litigation," must be handled the same way as any outside communication with third parties. There may be rare instances where it is necessary to release information to Congress that is not privileged but which may be enforcement sensitive.¹ Such information should be made available

¹Ethics Advisory 90-2 defines "Congress" as including the Speaker of the House, the President pro tempore of the Senate, and Chairs of Subcommittees or Committees.

only with the concurrence of the Assistant Administrator for the Office of Enforcement and Compliance Assurance and subject to such controls as may be required to ensure that confidentiality of the material or the investigation is not compromised. Of course, once a settlement is reached or a decision is obtained we must always be prepared to explain the result, respond to questions, and demonstrate that our action was fair and consistent with federal law.

The Department of Justice has taken the position that it will generally not provide information to Congress about ongoing investigations or negotiations. This policy is subject to extremely narrow exceptions for "unusual circumstances," e.g., where release of information is needed to assure the public that the matter is being investigated. Letter from Jamie Gorelick, then Deputy Attorney General, the Department of Justice to the Honorable Henry J. Hyde, Chairman of the House Judiciary Committee (March 16, 1995).

It continues to be against Agency policy to negotiate any terms of press releases with parties involved in Agency enforcement decisions. Memorandum from then-Deputy Administrator F. Henry Habicht on Press Release Policy (March 6, 1992).

Set forth below are several important points. Please note, however, that employees communicating with outside parties about specific enforcement actions should be familiar with all of the guidances, not just the points made below.

- ▶ Outside parties, including Members of Congress and their staff, should not attend settlement conferences or be present at meetings with defendants or respondents to discuss the status of enforcement actions. Nor should EPA employees share information about enforcement investigations, negotiations, litigation or settlement strategy or tactics with Members, their staff or other outside parties. In the interests of reaching a fair settlement (and consistent with the Executive Order on judicial actions), we often conduct negotiations prior to referral or the filing of a complaint. This process can work only where the confidentiality of such negotiations are respected.
- ▶ It may sometimes be necessary and appropriate to brief Members of Congress or their staff on the status of a pending case. In such instances, the briefing must be confined to information that is publicly available (e.g., information contained in a complaint), and care should be taken to note that our claims or allegations are not proven until the matter is settled or decided by a court of law. Such briefings should be coordinated through counsel for the case, who should be expected to attend. In keeping with current practice, the Department of Justice must also be consulted regarding any matter that is, or is likely to be, the subject of a referral.
- ▶ EPA employees should refrain from discussing sensitive information that was inadvertently leaked. The unauthorized release of sensitive information compromises the integrity of an enforcement action, is fundamentally unfair to defendants or respondents, and is grounds for disciplinary action. You should coordinate with counsel for the

enforcement action when distributing any public information (e.g., copies of the complaint) in response to requests from outside parties.

► If you receive a request from a Member of Congress or their staff for information about a specific enforcement case and you have questions about this memorandum or application of existing policies, please contact: Suzanne Childress at 564-2240 (Office of Regulatory Enforcement); Mary Adler at 564-2456 (Office of Criminal Enforcement, Forensic & Training); Karen Morley at 564-5132 (Office of Site Remediation Enforcement), and Mary Kay Lynch at 564-2574 (Office of Federal Facilities Enforcement).

I know you will give this memorandum and the attached guidance documents your personal attention, and assure that the Agency continues to meet the high standards for public service outlined in the Administrator's 1993 memorandum.

Attachments

cc: Assistant Administrators
Scott Fulton, Acting General Counsel
Joseph Crapa, Associate Administrator for Congressional & International Affairs
OECA Office Directors
Enforcement Division Directors
Regional Enforcement Coordinators



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

1933

THE ADMINISTRATOR

MEMORANDUM TO ALL EMPLOYEES**SUBJECT: Serving the Public Interest**

I am truly honored to have been selected to lead the Environmental Protection Agency. I believe that government service is a high calling and that EPA's potential to improve the lives of Americans is unparalleled. As I have met with many of you, I have learned that EPA employees share in that belief.

Among the most important of our challenges as public servants is our duty to live up to the public trust and confidence that sustains our work at EPA. As individuals and as an Agency, we must maintain the highest ethical standards in all our activities. This means conducting our business here openly, fairly and in accordance with all legal requirements.

In the tradition of recent Administrators, I am setting forth in this memorandum the guiding principles our Agency will use to ensure the integrity of all our actions. I ask each of you to join me in observing these principles.

General Principles

In all its programs, EPA must provide for the most extensive public participation possible in decision-making. This requires that we all remain open to all points of view and take affirmative steps to solicit input from those who will be affected by decisions. Our willingness to remain open to new ideas from our constituents, and to incorporate them where appropriate, is absolutely essential to the execution of our mission. At the same time, we must not accord privileged status to any special interest, nor accept any recommendation or proposal without careful, critical examination.

Appointment Calendars

To keep the public fully informed of my contacts with interested parties, I will make my appointment calendar for each week available in the Office of Public Affairs. I encourage the Deputy Administrator, all Assistant Administrators, Associate Administrators, Regional Administrators, and Staff Office Directors to make their appointment calendars available as well.

Litigation and Formal Adjudication

EPA is engaged in a wide range of both enforcement and defensive litigation. All pertinent communication with parties in litigation must be conducted through the attorneys assigned to the case. Program personnel who receive inquiries from parties regarding matters under litigation must immediately notify the assigned attorney and refer the caller to that attorney.

Formal adjudications (e.g., pesticide cancellation proceedings) are governed by specific requirements concerning *ex parte* communications in the various EPA rules governing those proceedings. These rules are collected and available in the Office of the General Counsel, Room 537 West Tower. I will conduct myself in accordance with these rules, and I expect all EPA employees to do the same.

Rulemaking Proceedings

In rulemaking proceedings under the Administrative Procedure Act, the basis for Agency decisions must appear in the public record. Therefore, after a rule is proposed, be certain that:

1. All written comments received from people outside the Agency (whether during or after the comment period) are entered in the public record for the rulemaking; and,
2. A brief memorandum summarizing any significant new data or information likely to affect the final decision that is received during a meeting or other conversation is placed in the public record.

These requirements are increasingly important as EPA continues to expand public involvement in our rulemaking efforts. I encourage you to solicit views from the broadest possible spectrum of interested parties in arriving at final rules. All interests should have an equal opportunity to meet with EPA. Meetings may be held with individual groups without involving all other interested parties. Of paramount importance, however, is ensuring any new data or information affecting the decision is promptly placed in the public record.

The Federal Advisory Committee Act (FACA) helps ensure that the Agency provides equal and open public access to the advice and recommendations EPA receives or solicits from outside parties. As many of you know, however, several exemptions are applicable. For example, when the Agency seeks the advice of individual meeting participants without seeking consensus, the gathering is not subject to FACA. This and other FACA exemptions may be helpful to you in obtaining a comprehensive response from interested entities during rulemakings while still meeting the letter and intent of FACA. Remember that questions about FACA's applicability and exemptions should be directed to the FACA experts in the Office of General Counsel's General and Information Law Division.

Contacts with Congress and the Press

EPA staff should be open and accessible to Congressional staff and the press. I rely on you to use common sense and good judgement in these interactions. I ask that you inform your Assistant Administrator's office, the EPA Press Office, and/or the Office of Congressional and Legislative Affairs promptly about all such conversations with the press or Congressional staff. The consistency and integrity of our communications will enhance public trust in the Agency.

Communications Generally

Finally, all communications materials produced for public dissemination should be developed in coordination with the Office of Communications, Education and Public Affairs. This will assure consistency with EPA standards and a number of OMB directives on such materials.

Over the last few years, EPA has built an excellent reputation for involving the public, Congress, the press and other interested parties in our work. This openness to the public furthers our mission by increasing our credibility, improving our decision-making and developing broad public support for Agency initiatives. I am proud of the actions you are all taking to improve public access to and involvement in our work. I look forward to working with you to implement these guidelines and to continue to promote public involvement and ethical conduct in all EPA affairs. I believe our ability to remain open to the public and to make fair, well-informed decisions is essential to our success. I look forward to hearing any additional ideas you have on how we can achieve this goal.


Carol M. Browner

OFFICE OF
GENERAL COUNSEL**EPA Ethics Advisory 90-2**

SUBJECT: Outside Communications Regarding Matters Under Investigation, in Pre-Litigation Stages, or in Litigation

FROM: Gerald H. Yanada *Gerald H. Yanada*
Deputy General Counsel
Designated Agency Ethics Official

TO: Deputy Ethics Officials

The purpose of this Ethics Advisory is to discuss how EPA employees should deal with verbal and written inquiries from outside parties (especially attorneys) concerning EPA matters known to be in litigation, in pre-litigation stages (e.g., negotiation), or under investigation. Unlike litigation between individuals, where an attorney's communication with a party represented by counsel is strictly limited,¹ an attorney representing a party in litigation with the Agency may not be prohibited per se from communicating with the Agency,² depending on the jurisdiction.³ Accordingly, EPA employees

¹ ABA Model Code of Professional Responsibility, Disciplinary Rule 7-104; ABA Model Rules of Professional Conduct, Rule 4.2.

² ABA Model Rule 4.2 states that communications "authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about a matter." The Comments on the Rule state that opposing counsel are otherwise generally barred from communicating "with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization...or whose statement may constitute an admission...." See also *Union Carbide Corp. v. United States*, 449 U.S. 383 (1981).

³ Rule 4.2 of new District of Columbia Bar Rules effective January 1, 1991, require only that attorneys "disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer."

must be alert to situations where opposing counsel seeks to communicate with EPA attorneys or officers or employees in the affected EPA program office about a matter under investigation or in litigation.

In addition to attorneys, outside parties may also include States or members of Congress, as well as the general public. Although EPA maintains a cooperative relationship with States, they may occasionally be adversaries in litigation. In addition, even where EPA could furnish such information to Congress itself,⁴ inquiries from individual members of Congress or their staffs regarding matters which are under investigation, in pre-litigation stages or in litigation should be handled the same as any other outside communications.

When such communications occur, EPA employees must be careful not to disclose non-public information that will interfere with an investigation or litigation. Providing "expert opinions" and advisory interpretations in connection with such matters should also be avoided (unless such opinions and interpretations have been formally adopted by the Agency).

Communications concerning various types of matters should be handled as follows:

Federal Matters in Litigation

When a communication concerns a matter in litigation (either an enforcement action or defensive litigation), EPA employee's must coordinate any response with the lead EPA attorney for the matter. For defensive litigation, this attorney will be in the Office of General Counsel (OGC) or the Office of Regional Counsel (ORC); for enforcement matters, this attorney will be in the Office of Enforcement (OE) or the Office of Regional Counsel (ORC); for enforcement matters arising under Title II of the Clean Air Act, the lead attorney will be in the Office of Mobile Sources within the Office of Air and Radiation (OAR).⁵

When a case involving the Federal Government is before a court, the lead EPA attorney must consult with the Justice Department on the matter before providing any response.

⁴ The "Congress" includes the Speaker of the House, the President pro tempore of the Senate, and chairs of committees and subcommittees.

⁵ OAR enforcement attorneys will either be in the Field Operations Support Division (FOSD) or Manufacturers Operation Division (MOD).



U. S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

March 16, 1995

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In October, 1993, my predecessor as Deputy Attorney General sent your predecessor as Chairman of the Judiciary Committee a letter setting forth the Department of Justice's policy and practice on communications between the Congress and the Department concerning pending Department investigations or civil or criminal cases, as well as applications for clearance under the Voting Rights Act. I believe it is in the interest of both the Congress and the Department to restate that policy for the new Congress.

Initially, of course, there is a clear distinction between Congressional-Departmental contacts on case-specific pending matters, and contacts on general policy issues related to law enforcement and the administration of justice. On policy issues, the Department welcomes and encourages a spirited dialogue with the Legislative Branch, and we value a dialogue with individual Members in shaping such policy. The same is true with respect to nominations, legislation, appropriations and other matters not relating to litigation or investigations.

We also recognize that policy issues may occasionally arise in the context of individual matters pending before the Department. We believe that discussion of those issues, without reference to the individual matter at hand, can be both appropriate and beneficial to the policy formulation process. And there also may be occasions when Justice Department lawyers will need to be in contact with the Congress concerning specific investigations or cases, where, for example, we are defending the constitutionality of legislation, or where individual Members are fact witnesses.

With respect to Congressional contacts on pending matters on behalf of or regarding constituents or other identified parties, however, our policy has historically represented different

concerns. As with the Department's policy concerning White House contacts on pending matters, our goal is to insure that the administration of justice is free of political considerations and that it is correctly perceived to be totally apolitical. We want to avoid any possible misimpression that persons with unique access to the Department, such as Senators or Representatives, whether acting for themselves or for constituents, receive more favorable treatment or attention than persons without such access. That is an important reason behind our desire to insulate the Department, and particularly its line and supervising attorneys, from any situation that could be construed as an effort (however inadvertent or well-intended) to influence our case-specific actions.

To this end, we would discourage contacts concerning pending investigations or civil or criminal cases. And we would request that, where Members of Congress or their staff deem it essential to make inquiries concerning pending matters, such inquiries be directed only to the Attorney General, the Deputy Attorney General, the Associate Attorney General, or the Assistant Attorney General for Legislative Affairs. To the extent possible, we also would request that these inquiries be in writing, and that they state the extenuating circumstances that appear to warrant the inquiry.

We will, of course, respond promptly to such inquiries. In the vast majority of cases, however, such an inquiry would result in the Department simply following its long-standing policy of not discussing the facts of a pending matter or investigation with persons outside the Department, except, of course, with persons representing parties to such a matter or inquiry. Indeed, for the most part we will not be able to confirm or deny that any particular individual or entity is under investigation or what steps we intend to pursue in a pending matter. As you know, the reasons for this policy are to protect the privacy and reputations of presumptively innocent individuals and to promote the efficacy and success of our investigations and litigation.

The Department had made exceptions to this general policy by publicly acknowledging particular civil rights or anti-trust investigations. These exceptions were broadened slightly on January 14, 1993, by then Attorney General Barr's revision of a portion of the United States Attorney's Manual. The general rule remains that Department personnel shall not respond to questions about the existence of an ongoing investigation or comment on its progress, including such things as the issuance or serving of a subpoena, prior to the public filing of the document. However, the Manual now provides that in the "unusual circumstances" of "matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the

public interest, safety, or welfare, comments about or confirmation of an ongoing investigation may need to be made."

In our view, the Department's policy is appropriate for a system in which investigations are often exceedingly complex, and where even the acknowledgement of an investigation, and particularly the identification of individual targets, can have dramatic adverse consequences for both the targets and third parties.

In light of these considerations, we would hope that in most cases Members of Congress would forbear from making case-specific inquiries. While no doubt well-intentioned, such inquiries have the potential for being misconstrued by the press and the public. Of course, even in the case of pending matters, the Department, through the Office of Legislative Affairs, will assist Members in obtaining access to public record information such as the procedural status of pending litigation.

We look forward to working with you and the Congress in providing information needed by Members, their constituents, and the legislative process, while faithfully carrying out the Department's responsibility for the evenhanded, impartial administration of justice.

Sincerely,

Jamie S. Goralick



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Press Release Policy

TO: - Assistant Administrators
Associate Administrators
Regional Administrators
Regional Counsels
Regional Public Affairs Directors
Staff Office Directors

As we begin a new year, it is appropriate to review EPA's policy on press releases on regulatory decisions and enforcement agreements, and on the content of those announcements.

The central requirement in EPA press policy--never to be compromised--is factual accuracy. As a public agency we have an obligation to listen and be sensitive to the concerns of any stakeholders or members of the public that our statements be accurate and not create misimpressions. However, the specific content of press releases is an EPA internal matter at all times. The EPA policy does not permit EPA employees to negotiate in any way the Agency's option to issue press releases or the content or wording of press releases with parties outside of EPA, including those parties involved in settlements, consent decrees, or the regulatory process. As such, the content of press releases should be designed solely to disseminate pertinent information to the news media, and it is against EPA policy to negotiate any terms of press releases with parties involved in Agency enforcement actions or regulatory decisions.

I thank you for your cooperation in ensuring that the appropriate members of your staff are familiar and comply with this policy.


F. Henry Habicht II
Deputy Administrator